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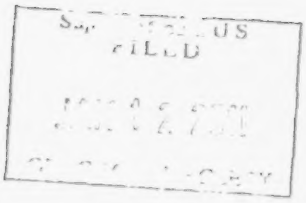

No. 10-594

IN THE SUPREME COURT OF THE
UNITED STATES

WILLIAM ALLEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States
Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

In re Winship,
397 U.S. 358, 90 S.Ct. 1068 (1970) 6

Irvin v. Dowd,
366 U.S. 717, 81 S.Ct. 1639 (1961) 1, 2

Reynolds v. United States,
98 U.S. 145 (1878)..... 1

Thompson v. Altheimer & Gray,
248 F.3d 621 (7th Cir. 2001)..... 1

United States v. Alexander,
48 F.3d 1477 (9th Cir. 1995)..... 4

United States v. Barraza,
576 F.3d 798 (8th Cir. 2009)..... 4

United States v. Garcia,
936 F.2d 648 (2nd Cir. 1991) 1

United States v. Gonzalez,
214 F.3d 1109 (9th Cir. 2000)..... 1, 5

United States v. Grandison,
780 F.2d 425 (4th Cir. 1985)..... 4

United States v. Johnson,
495 F.3d 951 (8th Cir. 2007)..... 3

United States v. Johnson,
403 F.Supp.2d 721 (N.D.Iowa 2005) 3

United States v. Sithithongtham,
192 F.3d 1119 (8th Cir. 1999)..... 1, 5

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The government's brief in opposition relies heavily on the traditional deference to be afforded a district judge in denying for-cause challenges. But the government's brief extends that deference far beyond what has been permitted by previous cases. The government's position is that deference to a district court should be so great that it trumps even what the juror herself has said. Thus, a juror who says that she would have difficulty being fair need not be stricken for cause where the district court believes, based on some separate observation, that the juror could be fair despite her own words. (G. Opp. 6-8) If the level of deference the government seeks were actually the law, denial of for-cause challenges would become essentially unreviewable on appeal. But it is not the law, nor has it ever been.

In order for a reviewing court to afford a district judge deference in denying a for-cause challenge, this Court, as well as lower courts, have always required that the juror must first, at the very least, have made an unequivocal statement evidencing an ability to be fair and impartial. *See*, *Reynolds v. United States*, 98 U.S. 145 (1878); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639 (1961); *Thompson v. Altheimer & Gray*, 248 F.3d 621 (7th Cir. 2001); *United States v. Garcia*, 936 F.2d 648 (2nd Cir. 1991); *United States v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000); *United States v. Sithithongtham*, 192 F.3d 1119 (8th Cir. 1999). No such statement was

made by Juror No. 31 in this case, and no deference should be afforded the district judge's determination that Juror No. 31 could be impartial.

It is the absence of an expression of impartiality by Juror No. 31 that warrants this Court's intervention. A clear line should be drawn requiring that a prospective juror who reveals a bias must make an unwavering affirmation of impartiality before she can be seated on a jury. To allow anything less renders appellate review meaningless, for how can an appellate court judge the exercise of discretion that is based on matters outside the record *and* contrary to the juror's own statements?

The government argues that great deference to the district court is warranted because jurors do not express themselves clearly, and are at times ambiguous and contradictory. (G. Opp. 7-8) Allen has no quarrel with this proposition, but it is of no assistance to the government in this case. Juror No. 31 did express herself clearly and unambiguously – she repeated over and over her inability to be fair based on the nature of the charges (child pornography with evidence of molestations) and her prior experience wherein her six year old daughter was nearly kidnapped and molested. When a juror has repeated an inability to be fair and impartial, particularly where that partiality and unfairness is based on a personal traumatic experience, no amount of deference to the trial court can suffice to deny a defendant his right to trial by a fair and impartial jury. *See*, *Irvin*, 366 U.S. at 728 ("[w]here so many, so many times, admitted prejudice, such a

statement of impartiality can be given little weight."). Moreover, a clear rule requiring an unwavering affirmation of impartiality would eliminate problems related to inartful statements by jurors. With a clear line in place and with appropriate questions, a district court can obtain unequivocal statements; *i.e.*, a simple yes or no.

The government also attempts to put a favorable spin on Juror No. 31's statements by claiming that she "twice said she would give petitioner the presumption of innocence." (G. Opp. 9) Juror No. 31 never said she would give Allen the presumption of innocence. Instead, she merely acknowledged that a defendant is entitled to a presumption of innocence, and stated that she might have some trouble with that, but would "try to be open-minded." (App. 32) And, she never "affirmed her belief" that she could set the prior experience with her daughter aside. (G. Opp. 9) Instead, she merely stated that "perhaps" she could. (App. 33)

The cases cited by the government to support the proposition that the statements by Juror No. 31 were sufficient to deny the for-cause challenge are easily distinguishable. For example, the government cites *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007), to support its position, but a review of the underlying facts set forth in the district court opinion shows that the juror at issue expressed fear that he would accord too much weight to victim-impact evidence, but ultimately agreed that justice required that he "look at the facts and understand the facts." *United States v. Johnson*, 403 F.Supp.2d 721, 787 (N.D.Iowa 2005). Moreover, the juror in

Johnson had not suffered through a prior traumatic experience similar to the offense on trial.

The same is true of *United States v. Barraza*, 576 F.3d 798 (8th Cir. 2009). The juror at issue, while expressing concern that the facts of the case would affect him, never said it would, and instead said that he would do his best not to let the nature of the offense affect him. Like in *Johnson*, he had never suffered any prior experience similar to the offense on trial.

United States v. Grandison, 780 F.2d 425 (4th Cir. 1985), is completely inapposite to the facts of this case. There the juror said she would not let the indictment influence her, and that she had no prejudice, bias or idea that would prevent her from giving an impartial verdict. *Id.*, at 432. Likewise, in *United States v. Alexander*, 48 F.3d 1477 (9th Cir. 1995), one of the jurors at issue, Juror Austin, specifically and unequivocally stated, with an unqualified "yes sir", that he could separate his earlier experience from the facts on trial. Moreover, his earlier equivocal statement expressed a belief in favor of impartiality not against it. *Id.*, at 1483 n. 1. As to the other juror at issue, Juror Kenny, while she never definitively expressed impartiality, her equivocations were also in favor of impartiality, not against it: Juror Kenny stated that she *did not believe* she would be affected by the past, and she *did believe* she could be fair to both sides. *Id.*, at 1483 n. 2.

Here, Juror No. 31 had a past traumatic experience wherein her then six year old daughter

was nearly abducted and molested. She was then called to sit on a jury for the trial of an accused child pornographer, in which the judge had already ruled that evidence of personal child molestation by the defendant was admissible. Her expressions of bias and partiality could not be undone by one statement agreeing to give Allen the "benefit of the doubt." These facts are much more akin to those of *United States v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000), and *United States v. Sithithongtham*, 192 F.3d 1119 (8th Cir. 1999). In *Gonzalez*, the defendant's conviction was vacated where a for-cause challenge was denied despite the juror never having affirmatively stated she could be fair and impartial, and instead only having stated she would try. Likewise, in *Sithithongtham*, the court held that a for-cause challenge should have been granted based on a juror's statement that he would probably give law enforcement the benefit of the doubt. These statements of partiality and bias, absent any other clear statements of impartiality, required the jurors to be stricken. The same is true for Juror No. 31 here.

The government's argument also incorrectly equates impartiality with the presumption of innocence. Juror No. 31 never said she could be impartial. And, even if she had made statements evidencing an intent to hold the government to its burden of proof by indicating she would give Allen the "benefit of the doubt", Allen was still denied his right to an impartial jury because a biased juror was seated. Judge Wood recognized this distinction in her dissent when she stated:

> "The benefit of the doubt" is not the same thing as impartiality – why should the government want a trial before a juror who has put a thumb on the defendant's side of the scale, if that is what she meant – and if the juror's statement is understood as an attempt at promising to hold the government to its burden of persuasion, it states an impermissibly lenient standard.

(App. 13)

The government misses Judge Wood's second point as well. At best, Juror No. 31 offered to give Allen the "benefit of the doubt."[1] But pursuant to this Court's decision in *In re Winship*, 397 U.S. 358, 361-64, 90 S.Ct. 1068 (1970), such a standard is unconstitutional. Conviction for a criminal offense requires proof beyond a reasonable doubt. *Id.* Because the requirement of proof beyond a reasonable doubt "provides concrete substance for the presumption of innocence", *id.*, at 363, the lenient standard Juror No. 31 promised to apply flies directly in the face of *Winship*.

All of the foregoing makes apparent the need for this Court's intervention and the establishing of a clear line. A juror who expresses a bias but later unequivocally states that she can be fair may be seated if the district court credits the statement. A

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[1] Juror No. 31 only agreed to this lesser standard of proof based on the district court's incorrect statement that it was permissible for her prior traumatic experience to have an impact on her. (App. 35)

biased juror who does not unequivocally state that she can set aside her bias must be stricken for cause. That is not a difficult proposition, nor an unduly burdensome requirement. Juror No. 31 never unequivocally said she could be fair. And, she only agreed to employ a standard of proof that is less stringent than the constitution requires. Allen is entitled to a new trial with an impartial jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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